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IN THE

Supreme Court of the United States.

No. 559. October Term, 1936.

GENERAL BAKING COMPANY (Plaintiff-Appellant in the Courts Below),

Petitioner,

v.

LUTHER A. HARR (SUCCESSOR TO WILLIAM D. GORDON), SECRETARY OF BANKING FOR THE COMMONWEALTH OF PENNSYLVANIA, IN POSSESSION OF THE BUSINESS AND PROPERTY OF THE FRANKLIN TRUST COMPANY, AND CHARLES I. ENGARD (SUCCESSOR TO JOHN J. SULLIVAN), SPECIAL DEPUTY IN CHARGE (Defendants-Appellees in the Courts Below),

Respondents.

REPLY BRIEF ON BEHALF OF PETITIONER.

As to Respondents' counter-statement of the facts.

The Petitioner feels obliged to direct the attention of the Court to the pleadings that the Court may ascertain what facts are established thereby and admitted by the Respondents. Pages three to twenty-one of the Record may be ignored, as those pleadings were superseded by the amended bill as amended (R. pp. 27 to 47), and the answer thereto (R. pp. 47 to 54).

Under Supreme Court Equity Rule number 30, all facts alleged in the Bill and not denied in the Answer thereto are taken to be admitted. This Court is therefore respectfully requested to disregard the argumentative statements and conclusions in the Respondents' amended Answer.

For the convenience of the Court, the pertinent paragraphs of the Bill of Complaint and the corresponding Answers thereto are as follows:

Bill as Amended

"8. On or about August 25, 1925, your orator entered into an oral agreement with the Franklin Trust Company, the terms and conditions of which were:

"(a) Your orator would open a checking account with the Franklin Trust Company and maintain an average balance of not less than $25,000.00 on which interest would be paid at the rate of 2 per cent. per annum; said account to be known as a 'Disbursement Account'." (Rec. p. 31.)

"(b) On Wednesday of each week, your orator would forward from its New York office to the Franklin Trust Company, a sum sufficient to maintain an average balance of not less than $25,000.00 in said checking account:

Answer as amended

"8. Your deponents qualify the averments of paragraph 8 of the amended Bill of Complaint, as amended, as follows:

"The facts alleged in subdivisions A and B of paragraph 8 of the amended Bill of Complaint, as amended, are admitted." (Rec. p. 48.)

Bill as Amended

"(c) The Franklin Trust Company would accept from your orator's distributors in Philadelphia, cash, also drafts and checks for collection, for the purpose of forwarding the cash, together with the proceeds of the drafts and checks, on Monday of each week to your orator, or its depository in New York City; said account to be known as a 'Deposit Account'." (Rec. pp. 31-32.)

Answer as amended

Defendants qualify the allegations in sub-division C of paragraph 8 of the amended Bill of Complaint, as amended, as follows:

"As by reference to the exhibits to the amended Bill of Complaint, as amended, will more specifically appear, your deponents aver that General Baking Company, the complainant, agreed to open a 'deposit account' in the Franklin Trust Company, wherein all moneys (including checks, cash and drafts) received by the three Philadelphia plants of the complainant were to be deposited, said deposits to be credited to the complainant, advices of each deposit to be forwarded to the offices of the General Baking Company in New York, and on Monday of each week the balance in the deposit account (as augmented by the funds received under the terms and conditions hereinafter set forth) to be forwarded by the Franklin Trust Company to the General Baking Company in New York or

Bill as Amended

"(d) The Franklin Trust Company would select, subject to the approval of your orator, certain correspondent banks in neighboring towns and cities in New Jersey, Delaware and Eastern Pennsylvania, to accept, from distributors of your orator, cash, drafts and checks to be credited to, and subject to the check of the Franklin Trust Company only, but earmarked as the funds of your orator; a written acknowledgment of receipt of said cash, drafts and checks by each of said correspondent banks to be mailed immediately upon receipt of same to your orator in New York City, and a credit advice to be immediately sent to the Franklin Trust Company whereby all cash, drafts and checks accepted by said correspondent banks were to be credited to the said deposit account referred to in Clause (c) above, for the purpose of the Franklin Trust Company forwarding the cash and the proceeds of the

Answer as amended

its depository." (Rec. p. 48.)

"The defendants qualify sub-division D of paragraph 8 of the amended Bill of Complaint, as amended, as follows:

"It was agreed by and between Franklin Trust Company and General Baking Company that Franklin Trust Company would make arrangements in certain towns in New Jersey, Delaware, Eastern Pennsylvania, and elsewhere, with banks of its selection, said banks to be approved by the complainant, to enable the cashiers of the distributors of the complainant in said towns to make deposits of their moneys (including cash, drafts, and checks) therein, said moneys to be credited in said banks to the account of the Franklin Trust Company, subject only to withdrawal by check of the Franklin Trust Company, a written acknowledgment of the receipt of said moneys to be mailed immediately upon receipt thereof by the outlying banks to the complainant, and a credit ad-

Bill as Amended

drafts and checks, together with the amount referred to in Clause (c) above, on Monday of each week, to your orator or its depository in New York City." (Rec. p. 32.)

"(e) That your orator might, at the special request and for the sole benefit of the Franklin Trust Company, from time to time, enter into separate and distinct oral agreements with the Franklin Trust Company whereby your orator would allow the Franklin Trust Company to use certain sums from those accepted by it for the purpose as set forth in Clauses (c) and (d) above, for certain periods of time, these sums to be called by your orator's check only, instead of being forwarded by the Franklin Trust Company. Under such agreements, and no other, would said funds, ever, become subject to check." (Rec. p. 32.)

Answer as amended

vice to be immediately forwarded to the Franklin Trust Company, all money so deposited in said outlying banks to be credited to the complainant's 'deposit account' in the Franklin Trust Company, and the proceeds thereof to be forwarded on Monday of each week to the General Baking Company or its depository in New York City." (Rec. p. 48.)

"Defendants qualify sub division E of paragraph 8 of the amended Bill of Complaint, as amended, as follows:

"Defendants have no knowledge that the agreement as therein set forth was entered into by the complainant and the Franklin Trust Company for the sole benefit of the Franklin Trust Company, and if the same is material, demand proof thereof. Defendants aver, moreover, that the allegation that said contract was entered into for the sole benefit of the Franklin Trust Company is a conclusion of law and therefore irrelevant." (Rec. p. 49.)

Bill as Amended

Answer as amended

"Defendants aver, moreover, that under the terms and conditions of the agreement entered into between the Franklin Trust Company and the General Baking Company, as set forth in the amended Bill of Complaint, as amended, and as qualified by this Answer, the Franklin Trust Company was authorized by the General Baking Company to retain and use all sums of money deposited by the General Baking Company in the Franklin Trust Company or the outlying banks, including not only the funds deposited in accordance with the special arrangements as set forth in sub-division E of paragraph 8 of the amended Bill of Complaint, as amended, and as qualified in this Answer, but also all other funds deposited in said 'deposit account' and in the outlying banks, in accordance with the agreement of the parties as set forth in subdivisions C and D of the amended Bill of Complaint, as amended, and as qualified in this Answer, for those periods of time during which

Bill as Amended

"12. In accordance with clause (e) of the agreement (referred to in Paragraph 8 hereof) your orator, at the special request and for the sole benefit of the Franklin Trust Company, did, from time to time, enter into separate and distinct oral agreements with the Franklin Trust Company whereby the Franklin Trust Company was allowed to use certain sums for certain periods of time, instead of forwarding to your orator, or its depository, in New York City. The sums left by your orator in accordance with these special agreements were subject to call by check signed by authorized officers of your orator. The approximate dates of said agreements, the total sums used, and the dates when the sums were called are as follows:

Answer as amended

said funds were in the possession of Franklin Trust Company and/or the outlying banks, and that there was thus created the relaship of depositor and depository with all the rights and responsibilities implicit therein." (Rec. p. 49.)

"12. Defendants admit the allegations in paragraph 12 of the amended Bill of Complaint, as amended, with the qualification that they deny that the funds deposited by the complainant, as therein alleged, were deposited at the special request and for the sole benefit of the Franklin Trust Company. Defendants further aver that, in accordance with the terms and conditions of the agreement entered into between the Franklin Trust Company and the General Baking Company, as set forth in the amended Bill of Complaint, as amended, and qualified by this Answer, the General Baking Company authorized the Franklin Trust Company to retain and use all funds deposited by the General Baking Company in the Franklin Trust Company or

Bill as Amended

November and December, 1927		$450,000.00
Called by two checks:		
One dated December 30, 1927	$400,000.00	
One dated December 31, 1927	50,000.00	450,000.00
March and April, 1928		440,000.00
Called by three checks:		
One dated March 29, 1928...	140,000.00	
One dated April 4, 1928.....	100,000.00	
One dated April 12, 1928....	200,000.00	440,000.00
June, 1928		100,000.00
Called by check dated June 29, 1928	$100,000.00	$100,000.00"

(Rec. p. 34.)

Answer as amended

in the outlying banks, whether deposited in the account known as 'Deposit Account' or otherwise,' and that there was thus created the relationship of depositor and depository with all the rights and responsibilities implicit therein." (Rec. p. 50.)

"14. From August, 1930, until October 5, 1931, or thereabout, your orator carried out and performed all of its obligations under the terms of the said agreement (referred to in Paragraph 13 above), and in accordance with Clause (f) thereof, at the oral request of the

"14. Defendants admit the allegations of paragraph 14 of the amended Bill of Complaint, as amended, with the qualification that where reference is made to the agreement, as set forth in paragraph 13 of the amended Bill of Complaint, as amended, the defendants

Bill as Amended

Franklin Trust Company, your Orator orally agreed to, and did, allow the Franklin Trust Company to use during September and the early part of November, 1930, sums totalling $100,000.00 which were called by check, dated November 18, 1930, in the amount of $100,000.00." (Rec. p. 36.)

"20. The total amount of cash, drafts and checks delivered by your orator to the said correspondent banks on September 26, October 2, 3 and 5, 1931, for the purpose set forth in Clause (e) of said agreement (referred to in Paragraph 13 hereof), was $32,403.26, which sum was in possession of the correspondent banks on or after October 6, 1931, and is now deposited in escrow pending a determination by this Court as to whom it should be paid." (Rec. p. 37.)

"24. The cash, together with the proceeds from the drafts and checks in the amount of $49,590.17 (referred to in Paragraph 21

Answer as amended

incorporate by reference their reply to said paragraph in this Answer, and with the further qualification that the defendants have no knowledge that the funds deposited with the Franklin Trust Company were so deposited at the oral request of the Franklin Trust Company, and if the same be material, defendants demand proof thereof." (Rec. p. 51.)

"20. Defendants admit the allegations in paragraph 20 of the amended Bill of Complaint, as amended, with the qualification that where reference is made to paragraph 13, subdivision E, the defendants incorporate by reference their answer to said portion of the amended Bill of Complaint, as amended, as contained in this Answer." (Rec. p. 52.)

"24. It is admitted that cash, together with proceeds from the drafts and checks in the amount of $49,590.17, referred to in paragraph 21

Bill as Amended

hereof) were diverted to, and mingled with, the cash funds of Franklin Trust Company, without your orator's consent or approval." (Rec. p. 38.)

"25. The cash funds of the Franklin Trust Company, of which the defendants took possession and control, were augmented to the extent of $49,590.17 by your orator's delivery to the Franklin Trust Company of the said cash, drafts and checks (referred to in Paragraph 21 hereof)." (Rec. p. 38.)

Answer as amended

of the amended Bill of Complaint, as amended, were mingled with the cash funds of the Franklin Trust Company without first obtaining complainant's specific consent or approval therefor. It is averred that by and under the terms and conditions of the agreement entered into between the Franklin Trust Company and the General Baking Company, as set forth in the amended Bill of Complaint, as amended, and qualified by this Answer, consent and approval were given by the General Baking Company to the Franklin Trust Company to divert said funds to and mingle said funds with the general funds of the Franklin Trust Company." (Rec. pp. 52-53.)

"25. The averments of fact in paragraph 25 of said amended Bill, as amended, are admitted to be true." (Rec. p. 53.)

Bill as Amended

"26. The cash funds of the Franklin Trust Company, of which defendants took possession and control, have been, at all times since the Franklin Trust Company accepted from your orator the cash, drafts and checks (referred to in Paragraph 21 hereof) and now are, in excess of the total amount of said cash, and the proceeds of said drafts and checks." (Rec. p. 38.)

"27. There were, and now are, assets of the Franklin Trust Company in the possession and control of the defendants sufficient to pay in full your orator and all other preferred claimants." (Rec. p. 38.)

Answer as amended

"26. The averments of fact in paragraph 26 of said amended Bill, as amended, are admitted to be true." (Rec. p. 53.)

"27. The averments of fact in paragraph 27 of said amended Bill, as amended, are admitted to be true." (Rec. p. 53.)

It is evident that Respondent has not denied Petitioner's averments. Likewise, Respondents' averments of their interpretation of the exhibits and averments of their conclusions neither establish facts nor amount to a denial of Petitioner's averments of facts.

As to Respondents' argument on the question of jurisdiction.

On page 10 of Respondents' brief one of the reasons assigned why the Federal Court does not have jurisdiction in this case is that the Respondents are mere stakeholders and that there are other indispensable parties to this litigation. Nevertheless Respondents accepted the decision of the Federal Court when it decided the case in their favor on the merits and did not file a cross appeal challenging the exercise of the court's jurisdiction. Consequently, petitioner thought it unnecessary to print the opinion of Judge Dickinson and the agreement entered into as a consequence thereof for the Record before the Circuit Court of Appeals. Inasmuch as the Respondents have seen fit to assert to this Court that they are stakeholders, counsel are duty bound to petitioner to set forth in full the agreements between the parties with respect to this litigation.

When the Respondents closed the doors of the Franklin Trust Company there immediately arose a dispute as to who was the owner of the cash deposited in the correspondent banks. The Respondents were attempting to collect the funds in the banks located in New Jersey, Eastern Pennsylvania and Delaware. The Petitioner was also attempting to collect them, and in pursuance thereof Petitioner's Counsel sent a letter on November 2, 1931, to all of the said banks reading as follows:

CONLEN, LABRUM & BEECHWOOD
PACKARD BUILDING
PHILADELPHIA

November 2, 1931

TO THE OFFICERS OF MECHANICS NATIONAL BANK,
Trenton, N. J.

Gentlemen:

We represent the General Baking Company, which has made certain deposits for collection at your Bank.

You are hereby advised that all checks, drafts, notes and other evidences of indebtedness, as well as cash deposited at your Bank, are the property of and belong to the General Baking Company.

You are hereby notified not to give, grant, or sell, assign or set over by way of credit memorandums, exchange of debits and credits, set offs or counterclaims, or in any other manner or form, any of the above mentioned property to the Secretary of Banking for the Commonwealth of Pennsylvania, in possession of the Franklin Trust Company, Philadelphia, or to the Franklin Trust Company, its successors or agents.

Very truly yours,

CONLEN, LABRUM & BEECHWOOD

By GEORGE E. BEECHWOOD

Ten days thereafter petitioner filed the bill of complaint in the District Court to restrain the Respondent from attempting to collect said funds from the aforesaid banks, and on November 12, 1931, his Honor, Judge Dickinson, after argument on petitioner's motion for injunction entered the following opinion:

"Upon the condition that defendant stipulates that a separate account will be kept of all moneys collected or received, which are subject to the claim of the plaintiff in the Bill, to the end that whatever claim or title or otherwise which the plaintiff has to said moneys may be asserted to and against the sum in the hands of the defendant, the motion for preliminary injunction is denied."

On November 24, 1931, petitioner's counsel addressed a letter to the then counsel for the Respondents reading as follows:

CONLEN, LABRUM & BEECHWOOD
PACKARD BUILDING
PHILADELPHIA

November 24, 1931

Re: General Baking Company—Franklin Trust Company
CHARLES S. WESLEY, ESQ.,
1000 Packard Building,
Philadelphia, Pa.

Dear Mr. Wesley:

We address you as counsel for William D. Gordon, Secretary of Banking in possession of the property and business of the Franklin Trust Company, Fifteenth and Chestnut Streets, Philadelphia, and John J. Sullivan, Special Deputy in charge.

On November 12, 1931, a Bill of Complaint was filed in the Eastern District Court entitled, General Baking Company v. William D. Gordon, Secretary of Banking for the Commonwealth of Pennsylvania, in possession of the business and property of the Franklin Trust Company, a corporation, and John J. Sullivan, Special Deputy in charge, September Term, 1931, No. 6783, in Equity. Service

of the writ of subpœna and the Bill has been accepted by you and your appearance has been entered for the defendants.

One of the purposes of the Bill is to impress a trust upon certain cash funds deposited on the 3rd and 5th days of October, 1931 in the Franklin Trust Company and various outlying banks, to wit:

First Mechanics National Bank, Trenton, N. J.
Wayne Title & Trust Company, Wayne, Pa.
West Jersey Trust Company, Camden, N. J.
First National Bank, Pleasantville, N. J.
Allentown National Bank, Allentown, Pa.
National Bank of Chester Valley, Coatesville, Pa.
Delaware County National Bank, Chester, Pa.
Farmers National Bank, Reading, Pa.
Wilmington Trust Company, Wilmington, Del.

In addition there were deposited for collection certain checks, drafts and other evidences of indebtedness with all of said banks, including the Franklin Trust Company, from which cash and/or money was realized. Another purpose of the Bill is to impress a trust on the funds realized from the collection of said checks, drafts and other evidences of indebtedness.

You will recall that on November 12, 1931 a motion for preliminary injunction was also filed in the above-entitled matter, praying that William D. Gordon and John J. Sullivan be restrained from demanding, collecting or attempting to collect any moneys in the outlying banks, and upon a hearing of said motion Judge Dickinson entered an order denying the motion, upon condition

"that the defendant stipulates that a separate account will be kept of all moneys collected or received, which

are subject to the claim of the plaintiff in the Bill, to the end that whatever claim of title or otherwise which the plaintiff has to said moneys may be asserted to and against the same in the hands of the defendant."

To avoid multiplicity of suits and the costs incident thereto and to comply with Judge Dickinson's order as counsel for the plaintiff we hereby agree that the money in the said outlying banks shall be collected by the defendants and deposited in a special, separate account with a financially sound and reputable Philadelphia Banking Institution, in the names of one or both of the defendants, subject nevertheless to the terms of this agreement. Said account shall remain undisturbed until a final determination of the above-mentioned litigation either by the District Court or any appellate court, and/or it may be withdrawn upon the mutual written consent of either of the defendants, or their successors, and the General Baking Company.

The agreement is to be without prejudice to the rights of either party, it being the intendment of the parties hereto that all of the rights of said parties shall remain the same as if the funds had remained in the possession and control of the outlying banks.

If you agree to the above please advise us in writing and this letter and your answer thereto will constitute the agreement.

Immediately upon receipt of your letter we will notify the outlying banks to honor at once the checks and/or drafts of the defendants.

Very truly yours,

CONLEN, LABRUM & BEECHWOOD

By GEORGE E. BEECHWOOD

On December 2, 1931, petitioner's counsel received from Respondents' counsel a letter reading as follows:

LAW OFFICES
One Thousand
PACKARD BUILDING

CHARLES S. WESLEY
J. W. MCWILLIAMS
G. A. TROUTMAN
C. B. WAGONER
G. B. WALKER
D. H. HAMILTON

TUSTIN AND WESLEY

PHILADELPHIA, December 2nd, 1931.

In re: General Baking Company—
Franklin Trust Company

GEORGE E. BEECHWOOD, ESQ.
1504 Packard Building,
Philadelphia, Pa.

Dear Mr. Beechwood:

Referring to your letter of November 24th, 1931, addressed to me, which I in turn forwarded to John J. Sullivan, special deputy as agent in charge of the Franklin Trust Company, I have received a reply from Mr. Sullivan authorizing me, on his behalf, to approve the terms outlined in your letter with the exception of the sentence beginning, "Said account shall remain undisturbed until a final determination of the above mentioned litigation either by the District Court or any appellate court and/or it may be withdrawn upon the mutual written consent of either of the defendants or their successors and the General Baking Company".

Mr. Sullivan informs me that he will not agree to the latter part of that sentence which reads as follows: "and/or

it may be withdrawn upon the mutual written consent of either of the defendants or their successors and the General Baking Company".

It is my understanding that it is agreeable to you to proceed with the course of action outlined in your letter of November 24th, with the above noted qualification. Mr. Sullivan informs me that he will open a special account in the Market Street National Bank to the credit of "William D. Gordon, Secretary of Banking in possession of the Franklin Trust Company of Philadelphia, Special", and into this account will go only the funds which are claimed by the General Baking Company.

Will you kindly confirm our qualified understanding as set forth above, and also immediately instruct each of the banks mentioned in your letter to honor Mr. Sullivan's draft? We will advise Mr. Sullivan to put the drafts through immediately.

Very truly yours,

L. S. WESLEY.

CBW:C

On December 3, 1931, petitioner's counsel, pursuant to the agreement, wrote a letter to all of said banks reading as follows:

CONLEN, LABRUM & BEECHWOOD
PACKARD BUILDING
PHILADELPHIA

December 3, 1931

MECHANICS NATIONAL BANK,
Trenton, N. J.

Gentlemen:

Referring to our letter to you of November 2, 1931 and subsequent correspondence and oral communication in

re General Baking Company-Franklin Trust Company, you are now hereby advised that the General Baking Company has now reached a satisfactory agreement with the Secretary of Banking in possession of the property of the Franklin Trust Company, with regard to the funds deposited in your Bank by the General Baking Company to the credit of the Franklin Trust Company.

By this agreement the necessity to litigate the rights in each case of the various outlying banks will be avoided by the litigation now pending in the Federal District Court for the Eastern District of Pennsylvania. The funds are to be collected by the Secretary of Banking and deposited in a separate account, subject to the determination of the pending litigation.

We, therefore, now advise you that it is in order for you to honor a check or draft of the Secretary of Banking and/or the Special Deputy in charge, John J. Sullivan, in respect to the deposits above referred to.

We wish to thank you, on behalf of the General Baking Company, for your splendid indulgence and co-operation in the premises,

Very truly yours,

CONLEN, LABRUM & BEECHWOOD

By GEORGE E. BEECHWOOD

It will be observed that the letters constituted the agreement between the parties, and that in reality, the situation is the same as it would have been had the Respondents instituted suit against the various banks to recover the funds in question and the Petitioner had begun a similar suit, and each of the banks had paid the fund into court and impleaded the Petitioner and Respondents.

The Market Street National Bank in Philadelphia is the stakeholder and the Respondents are in no sense of the word stakeholders.

The Statutes from which the Respondents receive their authority vests in them the right to sue for the recovery of property which they are seeking here to recover. The Statutes also expressly provide that the Respondents may be sued for the recovery of specific property.

The other argument of the Respondents that if the Federal Court entertains jurisdiction of this suit it will interfere with the orderly procedure of the liquidation of the Franklin Trust Company is answered by the fact that in order for the Respondents to have recovered the funds from the correspondent banks without petitioners agreeing thereto, the Respondents would have had to sue each and every one of said banks in the various states, and those suits would not have been in the Court of Common Pleas of Philadelphia County, and Petitioner would have intervened and asserted its title to the fund.

Aside from the foregoing it is difficult to understand how a determination by a Federal Court of Petitioner's rights in any way interferes with any res in the possession of the Respondents. A situation might arise where such an adjudication would so interfere, but it does not exist in the present controversy. To follow the Respondents' argument on this point to its logical conclusion means that any State may by an elaborate statutory scheme for the liquidation of corporations oust the jurisdiction of the Federal Courts in matters where citizens of other states have claims against corporations in liquidation.

Petitioner again reiterates that the Respondents were satisfied with the decision of the lower court when the deci-

sion was in its favor on the merits, and that no cross appeal was taken from the exercise of such jurisdiction. Petitioner also directs the Court's attention to the fact that when the Circuit Court of Appeals in its first decision decided the case on the merits against the Petitioner, the Respondents were satisfied that the Court had not abused its discretion in exercising jurisdiction. It was only when the Circuit Court of Appeals granted Petitioner's petition for reargument on the merits and indicated very strongly during the reargument that it had erred on the merits that Respondents became interested in the jurisdictional point. There is no doubt but that an appellate Federal Court may of its own motion dismiss the proceedings when the Court is in fact without jurisdiction. However, in the present proceedings, the Federal Court has undoubted jurisdiction. The question is whether the District Court abused its discretion in the exercise of that jurisdiction, and it is fatal to the Respondents not to have appealed from the original ruling of Judge Dickinson ordering the fund placed in escrow. They acquiesced and agreed to the same. In respect to this reference is made to the case of *Morley Construction Company v. Maryland Casualty Company*, 81 L. ed. 323, decided by this Court on February 1, 1937, in which it was held that an appellate court may not modify a decree for the benefit of the Appellee (Respondents) in the absence of a cross appeal.

As to Respondents' Argument on the Merits.

On page 39 of Respondents' brief there is a quotation from Judge Kirkpatrick's opinion as to why he decided against the Petitioner on the merits. The same reasoning is urged upon this Court. The quotation reads:

> "The fact that the parties contemplated and actually made subsequent arrangements by which large

> amounts of money in the deposit account were allowed to remain with the Trust Company for considerable periods without anything being said or done as to change the character of the deposit or the relationship created thereby is more than merely suggestive. What could be the purpose of these special arrangements unless it was understood all along that the money on deposit was being used by the Trust Company in its general banking business and it was desired to give them the use of more money for a longer time?"

A conclusion that nothing was said or done to change the character of the deposit or the relationship between the parties, does violence to the facts as established by the pleadings. The pleadings establish, beyond a doubt, that it was contemplated at the time of the original agreement that the petitioner might enter into, from time to time, separate and distinct agreements with the Franklin Trust Company whereby your Petitioner would allow the Franklin Trust Company to use a certain amount of the funds accepted by the Franklin Trust Company for the purpose of forwarding them to New York for certain periods of time, and that thereafter such funds were to be called by the Petitioner's check only, instead of being forwarded by the Franklin Trust Company, and that under such agreements and no other, would said funds ever become subject to check. It is admitted by the Respondents that such agreements were entered into, and that the Franklin Trust Company was allowed to use such funds. The agreement was that the petitioner might agree *to allow* the Franklin Trust Company *to use* certain amounts of the funds for a *definite period of time,* and *not* that the Petitioner might agree to allow the Franklin Trust Company *to continue to use* the funds for a longer period of time. The very fact

that the agreement contemplated that the petitioner might allow the Franklin Trust Company to use the cash for stated periods excludes the thought that the Franklin Trust Company could use the cash under any other circumstances. Certainly it cannot be said that nothing was said or done to change the character of the deposit. What was said and done was that the Petitioner agreed with the Franklin Trust Company that it would release it from its obligation to apply the cash to the purpose for which it was accepted and allow the Franklin Trust Company to use such cash for certain stated periods of time. When this was done, the relationship between the Franklin Trust Company and the petitioner became that of debtor and creditor and the funds became subject to the ordinary incident of check. With respect to the cash in question, no such agreement was entered into—the Franklin Trust Company was not released of its obligation to apply the cash to the purpose for which it was accepted.

On page 41 of the Respondents' Brief and in Judge Kirkpatrick's opinion, it is indicated that part of the consideration moving to the Petitioner was that the Franklin Trust Company was to deliver weekly payrolls to the Petitioner's branches. Petitioner asks the Respondents to point to any allegations in their Answer wherein it is averred that the Franklin Trust Company was to make up the payrolls for the Petitioner. It is true that the Franklin Trust Company, prior to the date the oral agreement was entered into, on August 25, 1925, wrote letters to the Petitioner suggesting that the Franklin Trust Company make up the payrolls as an inducement to Petitioner (R. pp. 39 to 41). However, the Petitioner in its answer to these letters makes no mention of the Franklin Trust

Company making up the payrolls. There is no mention made of it in the oral agreement and it is not averred as a fact in the Respondents' answer, nor even suggested.

The entire argument of the Respondents is based upon the fact that no express words called the transaction a trust relationship, and no express words forbade the Franklin Trust Company to apply the funds to a purpose other than that for which they were accepted. However, it is submitted that there was a clear understanding between the parties that the Franklin Trust Company was to apply the cash to a particular purpose and that the Franklin Trust Company was not to use such cash unless Petitioner made a special agreement to that effect.

The case of *Blakley v. Brinson*, 286 U. S. 254, relied on by the Respondents to sustain their position and referred to on pages 52, 54, 55, 56, 59, 71, 72 of their brief recognizes that in a fact situation similar to the instant case a trust arises. Mr. Justice Stone said at page 263:

> "The court below thought that the legal consequence to be attributed to the debiting of the account with the supposed purchase price of the bonds was the same as if the respondent had cashed a check for the amount and had then proceeded to hand the money back to the bank under a specific agreement between him and the bank that the money was to be held as a special fund, for the sole purpose of completing the purchase. This view is not without support. See Davis v. McNair (C. C. A. 5th), 48 F. (2d) 494; State v. Grills, 35 R. I. 70, 75, 85 Atl. 281; Northwest Lumber Co. v. Scandinavian American Bank, 130 Wash. 33, 39 A. L. R. 922, 225 Pac. 825; State ex rel. Spillman v. American Exch. Bank, 112 Neb. 834, 201 N. W. 895. See contra, Beard v. Independent Dist., 31 C. C. A. 562, 60 U. S. App. 372, 88 Fed. 375, 381; Mark v. Westlin

(D. C.) 48 F. (2d) 609; First Nat. Bank v. Williams (D. C.) 15 F. (2d) 585; Howland v. People, 229 Ill. App. 23; Miller v. Viola State Bank, 121 Kan. 193, 48 A. L. R. 373, 246 Pac. 517; People v. Merchants' & M. Bank, 34 Am. Rep. 532, 78 N. Y. 269; Hecker-Jones Jewell Mill. Co. v. Cosmopolitan Trust Co., 242 Mass 181, 24 A. L. R. 1148, 136 N. E. 333. Such a procedure, if actually carried out, might afford a basis, which is lacking here . . . "

In the case at bar the Petitioner delivered the cash in question to the Franklin Trust Company on a Saturday under an express agreement that cash would be transferred to Petitioner's depository on the following Monday. The Franklin Trust Company accepted the cash with this condition attached to it. Nothing further remained to be said or done by either party except the transfer of the cash to Petitioner's depository. The Franklin Trust Company remained open all day the following Monday but failed and neglected to transfer cash to Petitioner's depository in New York City and instead diverted Petitioner's cash and mingled it with the other cash funds of the Franklin Trust Company without Petitioner's consent or approval. The Petitioner thereafter traced and identified as a matter of law said cash, and the Respondents have paid it over to the Market Street National Bank in Philadelphia as a stakeholder pending a decision of the Federal Courts as to the rights of the respective parties.

With respect to Respondents' argument that the Franklin Trust Company was a purchaser for value of the checks, the fact situation and Respondents' own conduct clearly dispells any such thought. The Court will observe that after the Respondents closed the doors of the Franklin Trust Company, there were returned by the Respondents

to the Petitioner checks totalling $805.68, which Respondents were unable to collect on account of insufficient funds in the banks of the makers thereof (R. p. 37, Par. 21, corresponding Par. of Answer, R. p. 52). The Court will also note that there was returned to the Petitioner from a correspondent bank the sum of $20.85 representing a check which had been returned to said bank because of insufficient funds in the maker's bank (R. 36, Par. 16, and the corresponding Par. of Respondents' answer, R. p. 51). The Respondents thereby admitted that the Franklin Trust Company was not a purchaser for value of the checks and returned them to the Petitioner and took a credit for the total amount thereof. The Petitioner collected them and kept the proceeds. If the Franklin Trust Company had been a purchaser for value of the checks and drafts, Respondent would have collected the money directly from the makers and kept the proceeds derived therefrom for creditors. The argument now advanced by the Respondents is merely an afterthought.

With regard to the Respondents' argument relating to the funds in the correspondent Banks that Petitioner purchased the credit of the Franklin Trust Company, one fact admitted in both the Bill and Answer precludes any such conclusion. The Respondents admit and aver that all such correspondent banks selected by the Franklin Trust Company had to be first approved by the Petitioner before Petitioner would deliver any funds thereto. What possible interest could the Petitioner have had in such banks if Petitioner were purchasing the credit of the Franklin Trust Company? What the parties were thinking about was that all such banks were *agents* of the Petitioner and if any should fail before the funds were transferred, any loss re-

sulting therefrom would be that of Petitioner and not the Franklin Trust Company, and hence Petitioner insisted upon investigating and approving all such banks before delivering any funds to them.

Respectfully submitted,

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